

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PATRICK CODY, O/B/O A.L.F., a
minor child,

Plaintiff,

v.

CAROLYN W. COLVIN,

Defendant.

NO: 12-CV-0457-FVS

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 15 and 18. This matter was submitted for consideration without oral argument. Plaintiff was represented by Lora Lee Stover. Defendant was represented by Kathryn A. Miller. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment.

JURISDICTION

Patrick Cody protectively filed for supplemental security income ("SSI") on behalf of A.L.F., a minor ("Plaintiff"), on September 18, 2009. Tr. 152-158.

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JUDGMENT ~ 1

1 Plaintiff alleged an onset date of September 18, 2009. Tr. 178. Benefits were
2 denied initially (Tr. 98-100) and upon reconsideration (Tr. 102-104). Plaintiff
3 requested a hearing before an administrative law judge (“ALJ”), which was held
4 before ALJ Marie Palachuk on December 7, 2010. Tr. 50-95. Plaintiff was
5 represented by counsel and appeared at the hearing. Tr. 67-72. Plaintiff’s father,
6 Patrick Cody, and medical expert Margaret Moore, Ph.D., also testified. Tr. 55-67,
7 72-94. The ALJ denied benefits (Tr. 22-42) and the Appeals Council denied
8 review. Tr. 1. The matter is now before this court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF FACTS**

10 The facts of the case are set forth in the administrative hearing and
11 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner,
12 and will therefore only be summarized here.

13 Plaintiff was 9 years old and in fourth grade at the time of the hearing. Tr.
14 67. Plaintiff testified that she got in trouble at school last year for “not being nice.”
15 Tr. 69. Plaintiff’s father testified that she is on medication for ADHD. Tr. 76. He
16 testified that when Plaintiff was younger, she was removed from several daycares
17 for behavioral problems. Tr. 75-76. He testified that he has to constantly work to
18 keep Plaintiff organized and on schedule. Tr. 77-78. He testified that she does
19 better in school when they work with her “one-on-one” and that she is better
20 behaved with him than with her mom or at school. Tr. 80-81. Plaintiff’s father

1 testified that she has problems with bullying and fighting other kids at school, and
2 has been kicked out of the Boys and Girls club after school program. Tr. 82-84.
3 Plaintiff formerly received special education assistance but has since been placed
4 in the regular classroom. Tr. 58, 81. Plaintiff alleges disability based on attention
5 deficit hyperactivity disorder (“ADHD”) and oppositional defiant disorder
6 (“ODD”). Tr. 56.

7 STANDARD OF REVIEW

8 A district court's review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
10 limited: the Commissioner's decision will be disturbed “only if it is not supported
11 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
12 1158–59 (9th Cir.2012) (citing 42 U.S.C. § 405(g)). “Substantial evidence” means
13 relevant evidence that “a reasonable mind might accept as adequate to support a
14 conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently,
15 substantial evidence equates to “more than a mere scintilla[,] but less than a
16 preponderance.” *Id.* (quotation and citation omitted). In determining whether this
17 standard has been satisfied, a reviewing court must consider the entire record as a
18 whole rather than searching for supporting evidence in isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. If the evidence in the record “is susceptible

1 to more than one rational interpretation, [the court] must uphold the ALJ's findings
2 if they are supported by inferences reasonably drawn from the record.” *Molina v.*
3 *Astrue*, 674 F.3d 1104, 1111 (9th Cir.2012). Further, a district court “may not
4 reverse an ALJ's decision on account of an error that is harmless.” *Id.* at 1111. An
5 error is harmless “where it is inconsequential to the [ALJ's] ultimate nondisability
6 determination.” *Id.* at 1115 (quotation and citation omitted). The party appealing
7 the ALJ's decision generally bears the burden of establishing that it was harmed.
8 *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

9 SEQUENTIAL EVALUATION PROCESS

10 On August 22, 1996, Congress passed the Personal Responsibility and Work
11 Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 105 which
12 amended 42 U.S.C. § 1382c(a)(3). Under this law, a child under the age of
13 eighteen is considered disabled for the purposes of SSI benefits if that individual
14 has a medically determinable physical or mental impairment, which results in
15 marked and severe functional limitations, and which can be expected to result in
16 death or which has lasted or can be expected to last for a continuous period of not
17 less than 12 months. 42 U.S.C. § 1382(c)(a)(3)(C)(i)(2003).

18 The regulations provide a three-step process to determine whether a child is
19 disabled. First, the ALJ must determine whether the child is engaged in substantial
20 gainful activity. 20 C.F.R. § 416.924(b). If the child is not engaged in substantial

1 gainful activity, the analysis proceeds to step two. Step two requires the ALJ to
2 determine whether the child's impairment or combination of impairments is severe.
3 20 C.F.R. § 416.924(c). The child will not be found to have a severe impairment if
4 it constitutes a slight abnormality or combination of slight abnormalities that cause
5 no more than minimal functional limitations. *Id.* If, however, there is a finding of
6 severe impairment, the analysis proceeds to the final step, which requires the ALJ
7 to determine whether the impairment or combination of impairments meet,
8 medically equal or functionally equal the severity of a set of criteria for an
9 impairment in the listings. 20 C.F.R. § 416.924(d).

10 The regulations provide that an impairment will be found functionally
11 equivalent to a listed impairment if it results in extreme limitations in one area of
12 functioning or marked limitations in two areas of functioning. 20 C.F.R. §
13 416.926a(a). To determine functional equivalence, the following six broad areas
14 of functioning, or domains, are considered: acquiring and using information,
15 attending and completing tasks, interacting and relating with others, moving about
16 and manipulating objects, caring for self, and health and physical well-being. 20
17 C.F.R. § 416.926a.

18 ALJ'S FINDINGS

19 At step one of the sequential evaluation process, the ALJ found Plaintiff had
20 not engaged in substantial gainful activity since September 18, 2009, the alleged

1 onset date. Tr. 28. At step two, the ALJ found Plaintiff has the following severe
2 impairments: attention deficit hyperactivity disorder (“ADHD”) and oppositional
3 defiant disorder (“ODD”). Tr. 28. At step three, the ALJ found that Plaintiff does
4 not have an impairment or combination of impairments that meets or medically
5 equals one of the listed impairments in 20 C.F.R. Part 404, Subpt. P, App’x 1. Tr.
6 29. The ALJ then determined Plaintiff does not have an impairment or combination
7 of impairments that functionally equals a listing. Tr. 30. As a result, the ALJ
8 concluded that Plaintiff has not been disabled, as defined by the Social Security
9 Act, since September 18, 2009, the date the application was filed. Tr. 38.

10 ISSUES

11 The question is whether the ALJ’s decision is supported by substantial
12 evidence and free of legal error. Specifically, Plaintiff asserts that the ALJ erred at
13 step 3 of the sequential evaluation concerning the severity of Plaintiff’s
14 impairments. ECF No. 16 at 5-11. Defendant argues that the ALJ properly found
15 Plaintiff’s impairments were not functionally equivalent to a listed impairment.
16 ECF No. 18 at 5-15.

17 DISCUSSION

18 Where a child’s impairment does not meet or equal one of the Listings, her
19 impairments are evaluated under a functional equivalency standard. 20 C.F.R. §
20 416.926a. To be functionally equivalent, an impairment must “result in ‘marked’

1 limitations in two domains of functioning or an ‘extreme’ limitation in one
2 domain.” § 416.926a(a). The domains of functioning are: (1) acquiring and using
3 information; (2) attending and completing tasks; (3) interacting and relating to
4 others; (4) moving about and manipulating objects; (5) caring for yourself; and (6)
5 health and physical well-being. § 416.926a(b)(1).

6 A limitation is marked where an impairment “interferes seriously with your
7 ability to independently initiate, sustain, or complete activities.” §

8 416.926a(e)(2)(i). Marked limitations are “‘more than moderate’ but ‘less than
9 extreme.’” § 416.926a(e)(2)(i). A limitation is extreme where an impairment
10 “interferes very seriously with your ability to independently initiate, sustain, or
11 complete activities.” § 416.926a(e)(3)(i).

12 The ALJ is responsible for deciding functional equivalence after
13 consideration of all evidence submitted. 20 C.F.R. § 416.926a(n). The regulations
14 list the information and factors that will be considered in determining whether a
15 child’s impairment functionally equals a listing. 20 C.F.R. §§ 416.926a, 416.924a,
16 416.926a. In making this determination, the Commissioner considers test scores
17 together with reports and observations of school personnel and others. §§
18 416.924a, 416.926a(e)(4)(ii). The ALJ also considers what activities the child is, or
19 is not, able to perform; how much extra help the child needs in doing these
20 activities; how independent she is; how she functions in school; and the effects of

1 treatment, if any. § 416.926a(b). In evaluating this type of information, the ALJ
2 will consider how “appropriately, effectively, and independently” the child
3 performs activities as compared to other children her age who do not have
4 impairments. § 416.926a(b). This information comes from examining and non-
5 examining medical sources as well as “other sources” such as parents, teachers,
6 case managers, therapists, and other non-medical sources who have regular contact
7 with the child. *See* § 416.913(c)(3), d; Social Security Ruling (“SSR”) 98-1p, IV.B.

8 Plaintiff argues the ALJ erred by finding less than marked limitations in the
9 domains of acquiring and using information, and attending and completing tasks;
10 and no limitations in caring for self and health and physical well-being. ECF No.
11 18 at 6-11. The court will examine each domain in turn.

12 **A. Acquiring and Using Information¹**

13 In the ‘acquiring and using information’ domain, the ALJ considers how
14 well the child acquires and learns information, and how well she uses the
15 information she has learned. 20 C.F.R. § 416.926a(g). A typically functioning

16 ¹ In the introduction to her argument, Plaintiff did not identify the domain of
17 acquiring and using information. ECF No. 16 at 5. However, Plaintiff “takes issue”
18 with this domain later in her briefing and Defendant responds. ECF No. 16 at 11;
19 ECF No. 18 at 7-9. Thus, the court will evaluate the ALJ’s findings in the domain
20 of acquiring and using information.

1 school-age child (age 6 to attainment age of 12) is expected to: learn to read, write,
2 and do math; demonstrate learning by producing oral and written products, solving
3 mathematical problems, taking achievement tests, doing group work, and entering
4 into class discussions; use these skills in daily activities at home and in the
5 community; and use increasingly complex language to share information and ideas
6 with individuals or groups. § 416.926a(g)(2)(iv).

7 The ALJ identified a less than marked limitation in Plaintiff's ability to
8 acquire and use information. Tr. 33. Plaintiff "takes issue with the ALJ's adoption
9 of the medical expert [Dr. Donna Veraldi Ph.D.]'s, testimony and rating of
10 Plaintiff's capacities." ECF No. 16 at 11. Specifically, Plaintiff argues that Dr.
11 Veraldi testified that Plaintiff's fourth grade report card reflects she is "meeting
12 standards or approaching standards in many areas" (Tr. 58), when in fact Plaintiff
13 was given a score of "1" in her standard reading level, which is "below standard at
14 this time." Tr. 403. Plaintiff also contends that Dr. Veraldi was required to give her
15 opinion as to "the totality of the record and the entire time frame at issue" instead
16 of limiting her rating to the time frame covered by this particular report card. ECF
17 No. 16 at 11.

18 Defendant responds that the ALJ's finding of less than marked limitations in
19 this domain was supported by substantial evidence. The court agrees. As an initial
20 matter, Plaintiff offers no case law to support her argument. Further, despite

1 Plaintiff's contention, Dr. Veraldi did not view the fourth grade report card "in
2 isolation" when she determined that Plaintiff had less than marked limitations in
3 this area of functioning. *See* ECF No. 16 at 11. Rather, Dr. Veraldi testified that
4 Plaintiff's intelligence was normal despite her learning problems, and she was
5 within one standard deviation of either meeting academic standards or approaching
6 meeting standards in "many areas." Tr. 58. Moreover, as acknowledged by
7 Plaintiff, Dr. Veraldi found it significant that as of the hearing date Plaintiff was
8 moved out of the special services resource room. Tr. 58. Thus, Dr. Veraldi cited to
9 substantial evidence in the record to support her finding.

10 Perhaps more significantly, while not addressed by Plaintiff, the ALJ relied
11 on evidence in addition to Dr. Veraldi's testimony to support her finding of less
12 than marked limitations. *See Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir.
13 2005) (testimony of a medical expert may serve as substantial evidence when
14 supported by other evidence in the record). This evidence included (1) the opinion
15 of state agency reviewer Dr. Grant Gilbert, Ph.D., who found a less than marked
16 limitation as Plaintiff was at grade level in reading, writing and math despite 24
17 discipline reports from school (Tr. 381); and (2) the opinion of Plaintiff's third
18 grade teacher who found no limitations in this domain in November 2009 (Tr.
19 186). For all of these reasons, substantial evidence supports the ALJ's finding of a
20 less than marked limitation in this domain.

B. Attending and Completing Tasks

In the ‘attending and completing tasks’ domain, the ALJ assesses how well the child can focus and maintain attention, and how well the child begins, carries through, and finishes activities. 20 C.F.R. § 416.926a(h). A typically functioning school-age child (age 6 to attainment age of 12) is expected to: focus attention in a variety of situations in order to follow directions, remember and organize school materials, and complete assignments; concentrate on details and not make careless mistakes in work; change activities or routines without distracting yourself or others and stay on task and in place when appropriate; sustain attention well enough to participate in a group sport, read by yourself, and complete family chores; and complete a transition task without extra accommodation. § 416.926a(h)(2)(iv).

The ALJ found a less than marked limitation in the domain of attending and completing tasks. Tr. 34. Plaintiff assigns the exact same error in this domain that he did in the acquiring and using information discussed above. Namely, Plaintiff contends that Dr. Veraldi erred in viewing Plaintiff’s fourth grade report card in isolation rather than giving her opinion based on the totality of the record. ECF No. 16 at 11. This argument is similarly unavailing in this domain. First, Dr. Veraldi did not rely on the fourth grade report card when opining as to the attending and completing tasks domain. *See* Tr. 34. Instead, Dr. Veraldi acknowledged that

1 Plaintiff has ADHD and problems with focus and attention that make things
2 “difficult” for her, but still opined that these limitations were not severe enough to
3 put her outside the regular classroom, and were less than marked. Tr. 58-59.

4 Moreover, the ALJ’s finding of less than marked limitation in this domain
5 relied on evidence in addition to Dr. Veraldi’s opinion. *See Andrews*, 53 F.3d at
6 1041. Dr. Gilbert, the state agency consulting psychologist, opined that Plaintiff
7 has less than marked limitations despite needing reminders to finish things, being
8 disruptive without medication, problems paying attention, and focusing long
9 enough to finish projects. Tr. 381. The ALJ also relied on the questionnaire
10 completed by Plaintiff’s third grade teacher indicating an “obvious problem” in
11 this domain, which fell in a category between “slight problem” and “severe
12 problem.” Tr. 187. Thus, the ALJ properly considered the record as a whole,
13 including Dr. Veraldi’s opinion, and found a less than marked limitation in
14 attending and completing tasks as supported by substantial evidence.

15 **C. Caring for Yourself**

16 In the ‘caring for yourself’ domain, the ALJ considers how well the child
17 maintains a healthy emotional and physical state, including how well the child gets
18 physical and emotional needs met in appropriate ways, and whether the child takes
19 care of her own health, possessions, and living area. 20 C.F.R. § 416.926a(k). A
20 typically functioning school-age child (age 6 to attainment age of 12) is expected

1 to: be independent in most day-to-day activities; recognize competence in some
2 activities and difficulty with others; identify circumstances where she feels good
3 about herself and where she feels bad; begin to develop an understanding of what
4 is right and wrong, and acceptable and unacceptable behavior; and demonstrate
5 consistent control over behavior and avoid behaviors that are unsafe or otherwise
6 not good for her. § 416.926a(k)(2)(iv).

7 The ALJ found no limitations in Plaintiff's ability to care for herself. Tr. 37.
8 The ALJ cited the testimony of the medical expert and the opinion of Plaintiff's
9 third grade teacher to support this assessment. Tr. 37. First, the ALJ relied on Dr.
10 Veraldi's testimony that she "would put that as no limitation" as to this domain
11 because she doesn't "currently see things that indicate a limitation." Tr. 59.
12 Plaintiff argues that the ALJ and Dr. Veraldi "[f]ail[ed] to understand and apply"
13 the caring for yourself domain because "the evidence of record reflects that
14 [Plaintiff] has a 'marked' degree of limitation in this area when her emotional
15 difficulties are assessed under this [d]omain." ECF No. 16 at 6-9. Specifically,
16 Plaintiff claims she is "unable to use judgment as to her behavior as evidenced by
17 the school records demonstrating school discipline" between March 2008 and
18 September 2009 (Tr. 374-76); and post-hearing evidence of discipline for
19 inappropriate behavior, bullying, and fighting (Tr. 440-460). This argument is
20 unavailing. While these incidents of disciplinary action are notable, and

1 acknowledged by ALJ in her recitation of the facts (Tr. 31), Plaintiff references no
2 case law or medical evidence in the record to support precisely how these
3 disciplinary incidents indicate a marked limitation in the caring for yourself
4 domain. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th
5 Cir. 2008) (court need not address issues not briefed with specificity). The court
6 also notes that the ALJ properly relied on these disciplinary records in her finding
7 of marked limitation in the interacting and relating with others domain, which
8 considers how Plaintiff initiates emotional connections with others, cooperates
9 with others, complies with social rules, and respects the possessions of others. 20
10 C.F.R. § 416.926a(i).

11 Moreover, while not acknowledged by Plaintiff in her briefing, the ALJ also
12 relied on the opinion of Plaintiff's teacher in finding less than marked limitations.
13 Tr. 190. In a November 2009 teacher questionnaire assessing the domain of caring
14 for yourself, the teacher considered Plaintiff's ability to: handle frustration
15 properly, be patient when necessary, take care of personal hygiene, care for
16 physical needs, cooperate in or be responsible for take medications, use good
17 judgment regarding personal safety, identify and properly assert emotional needs,
18 respond properly to changes in own mood, use proper coping skills to meet daily
19 demands of school environment, and know when to ask for help. Tr. 190. The
20 teacher assessed no limitations in these categories and indicated no problems in the

1 domain of caring for yourself. Tr. 190. In the evaluation of child disability cases,
2 the opinion of a child's teacher is highly probative. As is the case with all "other
3 source" or lay testimony, the educator's opinions must be considered and the
4 weight given to them explained. *See Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d
5 1050, 1053 (9th Cir. 2006). The ALJ properly gave significant weight to the
6 opinions of Plaintiff's teacher. For all of these reasons, the ALJ's finding of a less
7 than marked limitation in the domain of caring for yourself is supported by
8 substantial evidence. Tr. 32.

9 **D. Health and Physical Well-Being**

10 In the 'health and well-being' domain, the ALJ considers the cumulative
11 physical effects of physical or mental impairments and their associated treatments
12 or therapies on functioning that were not considered under the moving about and
13 manipulating objects domain. 20 C.F.R. § 416.926a(l). Examples of limitations in
14 health and physical well-being include: physical effects from medications or
15 treatments; generalized symptoms such as weakness, dizziness, agitation, lethargy
16 or psychomotor retardation because of the impairment; somatic complaints;
17 limitation in physical functioning; and medical fragility. § 416.926a(l)(2), (4).

18 The ALJ found no limitation in the health and physical well-being domain.
19 Tr. 37. The ALJ noted that Dr. Veraldi testified she could not rate this domain as it
20 was outside her expertise. Tr. 59. Plaintiff argues this failure to express an opinion

1 was error because it “was within her duty to rate as a medical expert.” ECF No. 16
2 at 10. When evaluating a child disability case, an ALJ “is required to make a
3 reasonable effort to obtain a case evaluation, based on the record in its entirety,
4 from a pediatrician or other appropriate specialist, rather than simply constructing
5 his own case evaluation from the evidence in the record.” *Howard ex rel. Wolff v.*
6 *Barnhart*, 341 F.3d 1006, 1014 (9th Cir. 2003). However, Plaintiff offers no legal
7 authority indicating that the Dr. Veraldi had an affirmative “duty” to rate every
8 domain; nor does she assert that Dr. Veraldi improperly considered the case record.
9 Further, it is the ALJ’s responsibility to consider equivocal testimony of an expert
10 along with other evidence and medical opinions in reaching her conclusions. *See*
11 *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir. 1989). Dr. Veraldi’s lack of
12 opinion in this domain standing alone would certainly not be substantial evidence
13 in support of the ALJ’s finding of no limitation. However, as noted by Defendant,
14 the ALJ also properly relied on the lack of observed medical conditions by
15 Plaintiff’s teacher in making her finding. Tr. 37 (citing Tr. 191).

16 Plaintiff also contends that evidence of “inappropriate and oppositional
17 behavior as noted in the records from her school district and the Boys and Girls
18 Club ... rises to the level of establishing a ‘marked’ impairment in this domain.”
19 ECF No. 16 at 10. However, from a plain reading of the regulation, the court fails
20 to see how these disciplinary reports are evidence of a *physical* effect of Plaintiff’s

1 physical or mental impairments that make it difficult for her to perform activities
2 independently or effectively. *See* 20 C.F.R. § 416.926a(l). Plaintiff cites to no
3 physical effect of her mental condition, and none was noted upon review of the
4 record. Thus, the ALJ's finding of no limitation in the health and well-being was
5 free of harmful legal error.

6
7 **CONCLUSION**

8 After review the court finds the ALJ's decision is supported by substantial
9 evidence and free of harmful legal error.

10 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 11 1. Plaintiff's Motion for Summary Judgment, ECF No. 15, is **DENIED**.
12 2. Defendant's Motion for Summary Judgment, ECF No. 18, is
13 **GRANTED**.

14 The District Court Executive is hereby directed to enter this Order and
15 provide copies to counsel, enter judgment in favor of the Defendant, and **CLOSE**
16 the file.

17 **DATED** this 14th of April 2014.

18 *s/Fred Van Sickle*

19 Fred Van Sickle
20 Senior United States District Judge